### UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of	)	
FRESH & EASY NEIGHBORHOOD	)	
MARKET INC.,	)	
	)	
Employer,	)	Case Nos.
	)	
and	)	21-CA-38882
	)	21-CA-39100
UNITED FOOD & COMMERCIAL	j	
WORKERS INTERNATIONAL UNION, REGIO	N)	
8 – WESTERN,	j	
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Union.	j	

### RESPONDENT'S REPLY IN RESPONSE TO THE GENERAL COUNSEL'S ANSWERING BRIEF

Pursuant to Section 102.46 of the National Labor Relations Board's Rules and Regulations, Respondent Fresh & Easy Neighborhood Market Inc. ("Fresh & Easy," "Respondent," or "the Company") submits this Reply to General Counsel's answering brief to the Company's exceptions to the decision of Administrative Law Judge (the "ALJ" or the "Judge") in the above-captioned matter.

### **STATEMENT OF THE CASE**

On July 1, 2010, Fresh & Easy excepted to all of the unfair labor practice findings by the ALJ in his decision in the above-captioned matter dated June 3, 2010, and to his recommended order, which directed the Company to make certain proposed notice postings. On July 15, 2010, Counsel for the General Counsel of the National Labor Relations Board filed an Answering Brief responding to the Company's Exceptions.

As set forth below, Counsel for the General Counsel's Answering Brief does not refute the Company's arguments that the ALJ improperly determined that the Company

promulgated and maintained a rule prohibiting employees from talking about the Union, invited employees to quit their employment, and prohibited employees from talking about their discipline, all in violation of Section 8(a)(1) of the Act.<sup>1</sup> Accordingly, the ALJ's decision, recommended order, and notice should be rejected, and the Consolidated Complaint should be dismissed in its entirety.

### **ARGUMENT**

I. The Company Did Not Promulgate Or Maintain A Rule Prohibiting Employees From Talking About The Union In Violation Of Section 8(a)(1).

Counsel for General Counsel argues that the Company has not accepted the ALJ's credibility and factual findings with respect to James Tillinghast's and Shannon Hardin's two conversations in which Hardin told Tillinghast that she would talk about the Union while she was working. *See* AB 1 n.1, 11. However, Fresh & Easy relied entirely on the ALJ's factual and credibility findings to refute his conclusion that the Company violated the Act during these two conversations. *See* EB 3-5. In fact, citations to the ALJ's decision, and not to the transcript or hearing exhibits, are relied on almost exclusively by Fresh & Easy in its Exceptions Brief. *Id.* Regardless, even under Counsel for the General Counsel's version of events, Tillinghast did not violate the Act on either June 11, 2009, or August 3, 2009.

According to Counsel for the General Counsel, the following transpired:

• On June 11, 2009, Hardin approached Tillinghast and told him that she would be talking with other employees about the Union while she was working (and that she would not stop working during these conversations). Tillinghast responded that Hardin is not allowed to talk about the Union while she is on the clock or on the sales floor. Hardin protested that Tillinghast was wrong

<sup>&</sup>lt;sup>1</sup> Throughout this reply brief, citations shall be as follows: the ALJ's decision shall be "JD [Page]:[Line]"; the hearing transcript shall be "Tr. [Page]"; the General Counsel's exhibits shall be "GCX [Number]"; Respondent's exhibits shall be "RX [Number"; Respondent's Exceptions Brief shall be "EB [Page]"; and General Counsel's Answering Brief shall be "AB [Number]."

in his statement of the rule. She argued that employees could talk about the Chargers and their kids while working, and therefore employees are able to talk about the Union while working. Tillinghast asked, "Well are you going to solicit and sell season tickets for the Chargers?" Hardin responded that she would not because she does not have season tickets. Tillinghast concluded the conversation by telling Hardin that someone from corporate would contact her about their conversation. Hardin e-mailed Tillinghast later that same day, telling him that she would discuss the Union with her co-workers while working.<sup>2</sup> The very next day, Employee Relations Manager Paula Agwu visited Hardin at the store and told Hardin that she understood Hardin supported the Union and there would be no retaliation but that she was not allowed to solicit while on the clock or the sales floor. Hardin assured Agwu that she would not distribute on behalf of the Union while on the clock or the sales floor but that she would discuss the Union with her co-workers while working. See AB 5-6.

• On August 3, 2009, Hardin again approached Tillinghast to discuss discipline and, during this conversation, Tillinghast told Hardin that she may not talk about the Union while on the clock or the sales floor. Hardin responded by arguing that Tillinghast was wrong and that she could talk to her co-workers about the Union as long as she kept working. Tillinghast responded "okay." *See* AB 8-9.

Under even this version of events (which essentially is the same as that set forth in the Company's Exceptions Brief), Fresh & Easy has not violated the Act. Hardin told Tillinghast that she could talk to employees about the Union while working during both the June 11th and August 3rd conversations, Hardin confirmed that she would by e-mail after the conversation on June 11th, Agwu confirmed that she could on June 12th, and Tillinghast stated that she could during the August 3rd conversation. Hardin's Section 7 rights were in no way chilled and, in fact, the Company repeatedly reminded her about her rights and her ability to support the Union.

<sup>&</sup>lt;sup>2</sup> Tillinghast did not respond to the e-mail until several days later, but his response merely reassures Hardin of her Section 7 rights and allows Hardin to talk to her co-workers about the Union while they are working. *See* Tr. 124; RX1.

Additionally, as the Company argues in more detail in its Exceptions Brief,
Tillinghast's statements were isolated. *See* EB 9-10. Contrary to Counsel for General
Counsel's bald assertions in his Answering Brief, there were not a "number of
conversations" when Tillinghast made these statements (*see* AB 12), and he did not make
them to "employees" (*see* AB 2). The ALJ found Tillinghast made them only twice to only
Hardin -- not on a "number of occasions" to "employees." *Compare* JD 6:22 *with* AB 2, 12.
The ALJ also did not find that Tillinghast's statement to employees described by Debra
Kalilimoku actually occurred (*see* JD 4:41-49) and, in any event, that statement allegedly
occurred in mid-October, 2008 (*see* JD 3:45-46), and is well outside the Section 10(b)
period. *See* 29 U.S.C. § 160(b).

The General Counsel's Answering Brief merely regurgitates his Post-Hearing Brief, and does not address head on any of the Company's arguments in its Exceptions Brief regarding the June 11th and August 3rd conversations between Tillinghast and Hardin. The ALJ's decision with respect to Fresh & Easy's allegedly unlawful "no talking" rule should be dismissed because: (1) Hardin plainly knew that she could talk about the Union while working, as her credited testimony makes clear (and in any event as Agwu's and Tillinghast's credited testimony makes clear); and (2) irrespective of what Hardin knew, the statements were isolated and innocuous and do not rise to a violation of Section 8(a)(1).

# II. The Company Did Not Invite Employees To Quit Their Employment In Violation Of Section 8(a)(1).

Again, although Fresh & Easy's Exception Brief relies on the ALJ's factual and credibility findings (see EB 5-6), even under the Counsel for the General Counsel's "facts" (which are materially the same as the ALJ's factual findings and the Company's recitation of

facts in the Exceptions Brief), the Company did not violate the Act when Soliz spoke with Hardin on August 2, 2009. According to Counsel for General Counsel, the following statements were exchanged between Soliz and Hardin on August 2:

Soliz approached Hardin and Fresh & Easy employee Zuri Sadai while they were discussing one of Hardin's disciplinary notices near the cash registers. Soliz interjected and said that if Soliz had a manager that did not like her, then Soliz would take her check and walk out. Later that same day, Hardin approached Soliz and said that Hardin could not afford to quit. Soliz responded, "well, that's true." Soliz then said, "well if you get fired, at least you would get unemployment." After Hardin expressed that she was unsure about unemployment compensation, Soliz said, "well, I am sure in this case, I think you would qualify for it."

See AB 7-8.

Soliz statements were not an invitation to quit. Soliz was saying that Soliz would quit -- not that Hardin should quit if Hardin did not like her job. Soliz's statements, taken in their entirety, show that Soliz was merely trying to assure Hardin that the discipline was not that serious and that if something happened to Hardin that Hardin would be protected. Tellingly, Soliz explicitly told Hardin that she would receive unemployment compensation in response to Hardin's statements and questions. Soliz was reassuring Hardin, not inviting her to quit.

The cases cited by the ALJ and by Counsel for General Counsel do not support the proposition that Soliz's statements were to an invitation to quit. In each of these cases, the manager at issue explicitly invited the employees to quit. *See* EB 10-11 (discussing *McDaniel Ford, Inc.*, 322 NLRB 956, 962 (1997), cited by the AL); *Kenrich Petrochemicals, Inc.*, 294 NLRB 519, 524 (1989) (manager used expletives in telling employee to quit if the employee did not like the way the manager ran the business); *Stoody Co.*, 312 NLRB 1175, 1177 (1993) (manager told employees that if they were so nitpicky, then perhaps they

should not work at the company); *Rogers Elec., Inc.*, 346 NLRB 508, 513 (2006) (manager told employee that if the employee did not like the way things were run, then the employee should quit); *The Kroger Co.*, 311 NLRB 1187, 1188 (1993) (manager told the employee to quit if the employee did not like working at the business). In comparison, there was no invitation to quit in this case, and Fresh & Easy accordingly did not violate the Act.

## III. The Company Did Not Prohibit Employees From Talking About Their Discipline In Violation Of Section 8(a)(1).

Counsel for General Counsel's Answering Brief leaves out a crucial fact credited by the ALJ: Hardin was emotional when Tillinghast administered her performance improvement plan on September 26, 2009. *See JD* 5:38-39. The ALJ found as much, Tillinghast testified as much, and Hardin admitted as much. *See id.*, JD 5:40-46; Tr. 44. In fact, Hardin said that she became even more emotional on the sales floor. *See* Tr. 44. Given Hardin's emotion, Tillinghast was entirely within his rights to tell Hardin not to talk about her discipline on the sales floor on September 26, 2009. *See, e.g., Desert Palace, Inc.*, 336 NLRB 271, 272 (2001) (employee's Section 7 rights do not trump employer's legitimate and substantial business justifications for prohibiting discussion of discipline); *see also McBride's of Naylor Road*, 229 NLRB 795, 795 (1977) (employer has authority to prohibit certain conduct in the selling areas of a retail store); *J.C. Penney Co.*, 266 NLRB 1223, 1223 (1983) (same).

Regardless, Tillinghast's comment affected only one employee (Hardin) for only a short period of time (less than one day) in a work area only (the sales floor of a retail establishment). *See* JD 5:31-38. Hardin was free to discuss her discipline even that day in break and other work areas. *Id.* Tillinghast's statement to Hardin was reasonably tailored to deal with a legitimate business interest, *i.e.*, ensuring that customer service was not

disrupted because of Hardin's emotions that day. *Id.* Her Section 7 right to discuss her discipline with her co-workers simply was not chilled. The Complaint action is entirely without merit, even under the facts credited by the ALJ.

#### **CONCLUSION**

For all of the foregoing reasons and those set forth in the Company's Exceptions
Brief, Fresh & Easy respectfully requests that the Board grant its exceptions and that the
Consolidated Amended Complaint be dismissed in its entirety.

Respectfully submitted,

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**Dated: July 29, 2010** 

### **CERTIFICATE OF SERVICE**

I hereby certify that on July 29, 2010, I caused copies of the **Respondent's Reply in Response to General Counsel's Answering Brief** to be served upon the following by the NLRB's e-filing system:

National Labor Relations Board 1099 14th Street, N.W. Washington, DC 20570-0001

I further certify that I emailed the foregoing document to the following in accordance with Board Rules & Regulations Rule 102.114(i):

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